UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302	)	
and	)	Case 19-CA-32298
	)	19-CA-32319
REBEKAH SILVA	)	19-CA-32435
and	)	
TIFFANY KELLY	)	

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

David A. Hannah, Esq.
12701 NE 9th Place, Suite D311
Bellevue, Washington 98005

Counsel for IUOE Local 302

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NATURE OF THE PROCEEDINGS

Administrative Law Judge George Carson II issued a Decision on this matter January 24, 2011 ("Decision"). Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Respondent International Union of Operating Engineers, Local 302 ("IUOE Local 302" or "Respondent") is, in separate documents, filing Exceptions to this Decision and a brief in support of those exceptions. This is Respondent's Brief in of those Exceptions.

INTRODUCTION

The fundamental flaws in Judge Carson's decision were to find union animus on the part of Respondent by inference, by failing to identify evidence of a causal nexus between any purported evidence of animus and adverse employment action, and disallowing Respondent from presenting evidence of the business justification for its actions. The specifics of these errors are detailed below, and in the Exceptions to the Decision which are submitted herewith under separate cover.

STATEMENT OF THE CASE

The Decision is correct with respect to the statement of the jurisdictional facts. (Dec. at p. 2, l. 5 – 15)[1] The Decision also correctly recites the history of collective bargaining relations between Respondent and Charging Party OPEIU, Local 8 ("Local 8"), the bargaining representative of Respondent's clerical employees in its Bothell, Washington central office. (Dec. at p. 2, l. 21 – 32) The identity of the employees within the Local 8 bargaining unit as of 2009 is stated correctly. (Dec. at p. 2, l. 34 - 37)

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[1]. Herein, references to the Decision are identified as "Dec. ", references to the Transcript of Proceedings are identified as "Tr. " and references to exhibits introduced by, and received from the General Counsel and Respondent as identified as "GC " and "R " respectively.

The Decision omits certain facts concerning Respondent's operations and personnel that provide context to the events at issue. By a Letter of Understanding to the CBA dated March 10, 2008, Accountant Beverly Colegrove was excluded from the bargaining unit as a confidential employee. (GC 4 at 17) By mutual consent, the position of Executive Assistant, staffed by Sandy Early, was likewise excluded from the bargaining unit. (Tr. at 322, Early)

Respondent's Constitution and Bylaws provide for two elected officers who work in the central business office full time. (Tr. at 526, Stipulation) Those positions are Business Manager and Financial and Corresponding Secretary. (*Id.*) Under the terms of the Constitution and Bylaws, the Business Manger is the Chief Executive Officer of the Local, and the person who has ultimate authority with respect to hire, termination and discipline of staff members. (Tr. at 527, Stipulation)[2] At all material times, Daren Konopaski has been Respondent's Business Manager and Malcolm Auble its Financial and Corresponding Secretary. (GC 1S at 4; GC 1U at 2)

The Decision correctly states Charging Party Rebekah Silva's tenure of employment and assumption of the role as Shop Steward at the Bothell office. (Dec. at p. 2, l. 38 – 46) However, the Decision omits critical facts concerning Ms. Silva's job performance and evaluation from Spring of 2006 until her termination in 2010.

Throughout her employment as Dues Representative, Ms. Silva was either directly, or with intermediate supervision, supervised by Mr. Auble. (Tr. at 528, Stipulation) Mr. Auble conducted periodic evaluations of Ms. Silva's performance.

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[2]. The General Counsel ("GC") entered into a conditional stipulation on this point, reserving the question of whether Local 302 functioned in accordance with these terms of the Constitution and Bylaws, but agreed that these documents so provide. (Tr. at 527)

Each of Ms. Silva's evaluations from September, 2007 to May, 2009, contained a common element. (Tr. at 542, Auble; R. 35)[3] Mr. Auble described it (Tr. at 542):[4]

> Well, the real pattern that you can see, I believe on every one of them, is her attention to detail and the errors, especially the deposits and such, and then in all of them, there always seems to be an attitude comment – comment about attitude to bring up the attitude to be more positive, especially with coworkers or members. (Emphasis added)

Ms. Silva was prompted regarding her attention to detail in each of her evaluations. An example appears in the September 27, 2007, evaluation (R. 35):[5]

> Deposits: simple addition errors when totaling the cover page. Need to double check your work before it is given to Bev for the deposit. (Emphasis added)

The Decision makes no finding concerning these evaluations or their import.

The Decision does not discuss the work history of Charging Party Tiffany Kelly. Prior to her layoff on December 5, 2009, Ms. Kelly worked "for about four years" in the Local 8 represented position of Receptionist at the Bothell office. (GC 31; Tr. at 196, 221, Kelly) Mr. Auble was involved in the interview process which resulted in Ms.

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[3]. Each of these evaluations was conducted with the assistance of Office Manager and Local 8 bargaining unit member Monique Paullus. (Tr.at 540, Auble) Ms. Paullus functions as a Dues Clerk lead and in "liaison with management." (Tr. at 324, Early) Exception #7 addresses Judge Carson's finding concerning Ms. Paullus' supervisory status.

[4]. Dues Representative and Local 8 member Sabrina Kihne described the job she and Ms. Silva perform. Asked whether the Dues Representative position requires attention to detail, Ms. Kihne responded "certainly." (Tr. at 500, Kihne) Asked why, Ms. Kihne responded: "Because the monies processing through our office have to do with membership monthly dues and dues status, whether or not a member is considered to be current or in arrears." (*Id.*)

[5]. The Board can, and should, independently evaluate the record with respect to Judge Carson's decision to credit Ms. Silva's testimony and discredit all other contrary witnesses. Marshall Engineered Products Company, 351 NLRB 767, 768 (2007). Judge Carson credited Ms. Silva although having impeached her with questions from the bench. For example, she testified that, with the exception of the October 2008 evaluation, these evaluations never happened, nor was she apprised of the contents of these evaluations. (Tr. at 605-610, Silva) Contradicting this assertion, Ms. Silva testified on cross that these evaluations were not a fabrication. (Tr. at 615, Silva) She then abandoned her earlier testimony and offered: "we didn't have reviews very often at all" and "We didn't have reviews very often at all." (Tr. at 618, Silva)

Kelly's hire. (Tr. at 536, Auble) At the time of her interview, Ms. Kelly's skills were only evaluated for the receptionist position. (Tr. at 534, Kelly)

The Decision contains a selective recitation of Ms. Silva and Ms. Kelly's disciplinary history. Corrective counseling was necessary as to both throughout their employment. Those disciplinary events were based upon violation of the Local 302 Policy Statements, which supplement the terms of the CBA. (GC 18)

Prior to February 4, 2010, these policies were issued *ad seriatim.* The earliest was titled "Policy Against Employment Harassment, Including Sexual Harassment" dated January 1, 2003. (GC 18) This was followed by a "Expectations of Employer" policy [2/19/03]; one titled "Policy Regarding Work Hour Reporting Using the Time Clock as Provided on Each Local 8 Employees Computer" (typo in original) [6/13/2005]; an Attendance Guidelines for IUOE Local 8 Employees [11/2/05]; and an E-mail and Internet Communications Policy [6/22/06]. The Local 8 represented staff were asked to acknowledge receipt of these policies as a packet, and Ms. Silva did so on September 28, 2008. (GC 18)[6] Both Ms. Silva and Ms. Kelly were disciplined under the November 2, 2005 attendance policy.

The Decision correctly finds that effective January 21, 2010, Executive Secretary Early "was assigned the oversight of the Local 8 employees." (Dec. at p. 5, l. 24 – 25) As of January, 2010, that staff consisted of CA Elle Ray, Dues Representatives Silva and Kihne, and Office Manager Paullus. (Tr. at 327, Early) Ms. Kelly was on layoff, with a right of recall until December 4, 2010. (GC 4 at 4) Judge Carson noted, correctly that the layoff of Kelly was not asserted as an unfair labor practice. (Dec. at p. 3, l. 22 – 23)

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[6]. Mr. Auble testified, without contradiction, that this was a collectively bargained "no fault" policy. (Tr. at 545, Auble)

The Decision is correct that an "all hands" meeting was held by the managerial employees with the Local 8 represented staff and their bargaining representative on January 21, 2010. (Dec. at p. 7, l. 47 – 48) However, the Decision contains erroneous findings of fact regarding what transpired.[7] At that meeting, Ms. Early distributed a draft of the restated Local 302 personnel policies to each attendee. (Tr. at 328, Early; R. 7) She then read each policy aloud in its entirety. (Tr. at 330, Early) Questions were fielded from the Local 8 represented staff and their representative. (Tr. at 332-333, Early) The draft policies contained a revision to policy respecting arrival and departure times. (GC. 19) The fact this revision was prompted by advice from the Department of Labor during an audit was explained to those in attendance. (Tr. at p. 285, l. 8 – p. 286; R. 7 at p. 5) The Decision erroneously finds no such connection was made.

Also at the January 21 meeting, a clarification was made that the existing policy regarding internet access applied only to the Local 8 represented staff. (Tr. at p. 238, l. 12 – 15) It was explained that this revision, but no other aspect of the policy revision, was in response to testimony introduced in an arbitration held September 2009. (*Id.*) The Decision erroneously finds that the whole of the policy revision was "in response to the arbitration." (Dec. p. 8, l. 1 – 2). Respondent has taken exception to this finding.

The Decision then makes incorrect factual findings concerning Local 8's request for bargaining with respect to these proposed policy revisions.[8] The Decision fails to note that, following the meeting, Ms. Early sent an electronic copy of the draft policies to Ms. Maloy. (Tr. at 342; GC 19) Four days later, Ms. Early sent Ms. Maloy a second

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[7]. The errors of fact finding with respect to the January 21, 2010 meeting are the subject of Exceptions #18, 19, 36, 38 and 40.

[8]. Exception 39.

electronic copy of the restated policies, making a minor correction. (Tr. at 342, Early) The Decision also fails to find that Respondent agreed to bargain as to all but those policies for which Local 8 had previously waived bargaining, and those for which no bargaining was required by law. (GC 11, 35, 37, 38)

The Decision correctly describes the hire of Lucy Miyamoto as Bookkeeper Assistant to Beverly Colegrove, the departure of Elle Ray from the position of Contract Administrator, and the selection of Ms. Miyamoto to fill the Contract Administrator position. (Dec. p. 4, l. 1 – 35) However, the Decision draws an improper inference that Ms. Miyamoto "was hired in order to assure that a unit employee other than Silva was awarded the position. (Dec. at p. 4, l. 35 – 37)[9] The un-contradicted evidence was that Ms. Miyamoto was "very much" the superior candidate to fill the Contract Administrator position. (Tr. at 565, Auble)[10] The evidence was also undisputed that since assuming that job, Ms. Miyamoto has divided her time with the accounting assistant position-without the errors previously experienced. (Tr. at 303, Colegrove)

The Decision correctly finds that "[o]n February 24, Silva, at her request, met with Early." (Dec. at p. 8, l. 40) However, the Decision makes an incorrect finding with respect to what transpired at the meeting, and this finding is based on an erroneous credibility determination. (Dec. at p. 8, l. 40 – p. 9, l. 2)[11]

The Decision finds that "Early did not inform Silva of her mistakes, the continuing monitoring [of her work], or a need to improve her performance." (Dec. p. 9, l. 26 – 27)[12]

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[9]. As Exception 5, Respondent has taken exception to this inference.

[10]. Respondent's determination of which employee was the better candidate is not assailable. Healthcare Employees Union, Local 399 v. NLRB, 463 F.3d 909, 920 (9th Cir. 2006)

[11]. Respondent has taken exception to this finding in Exceptions 22, 25, 27.

[12]. Exception 25 is taken with reference to this finding.

To the contrary, Ms. Silva's work performance was a central issue of the February 24 meeting. (R. 12; Tr. at p. 356, l. 9 – p. 358, l. 19) Ms. Silva's work performance was a constant source of discussion, counseling and correction. (R. 35)

The Decision makes erroneous findings of fact concerning errors she committed prior to taking a personal leave of absence in 2009, the discovery of those errors, and the effort to redistribute her work and assist her performance upon her return. (Dec. p. 6, l. 4 – 15; p. 7, l. 16 – 21; p. 8, l. 40 – p. 9, l. 30)[13] The credible evidence in the record is as follows:

While Ms. Silva was on a six month personal leave in 2009, Ms. Kihne assumed responsibility for the "retiree report" Ms. Silva had been performing. (Tr. at 506, Kihne) Prior to coming to Local 302, Ms. Kihne had been employed in a Local 8 bargaining unit position by Respondent's pension and health administrator, Welfare and Pension Administration Service ("WPAS"). (Tr. at 499, Kihne) Prompted by the discovery of "multiple" errors in the retiree reports Ms. Silva had been preparing prior to taking leave, Ms. Kihne brought the matter to Ms. Paullus, who referred her to Mr. Auble. (Tr. at 506-508, Kihne) Mr. Auble recommended a two month "look back," which unearth additional errors and prompted further investigation. (Tr. at 509, Kihne) The additional investigation involved consultation with a representative of WPAS. (Tr. at 509-511, Kihne) To the extent possible, these errors were collected and corrected by Ms. Kihne

[13]. These errors are the subject of Exceptions 11, 12, 15, 16, 17, 22, 26, 27, 28, 29, 41, 43, 45, 46 and 47.

based on a report she prepared. (Tr. at 511, Kihne)[14] A total of thirty-nine (39) errors attributable to Ms. Silva were discovered. (Tr. at 593, Auble)[15]

The Decision is correct in finding that on "December 7, [Ms. Silva] was issued a written reprimand for those errors." (Dec. p. 7, l. 6 – 7; GC 16) The Decision fails to credit this warning as an appropriate next step in corrective action that began with her periodic performance evaluations. The Decision also fails to give credence to the clear evidence that this corrective action did not improve Ms. Silva's work performance.

Although Ms. Silva had been relieved of the most time consuming of her tasks, the "retiree reports," it was necessary for Ms. Paullus and Ms. Kihne to "catch her up" one month after she returned. (Tr. at 449, Paullus) When Ms. Silva complained that she was falling behind again one month later, Ms. Paullus and Ms. Kihne provided additional assistance (Tr. at 450, Paullus):

> She was still behind. She indicated that the desk was always behind. I never saw that. So we, you know, took on tasks from that position, both Sabrina and myself, to help her get the desk caught up and back on track. I walked her through, you know, these are things that you should be doing at the beginning of the month, the middle of the month, the end of the month, trying to help priorities, to help her out as well. (Emphasis added)

In addition, Ms. Paullus continued noting errors that were committed by the front office staff, including her own errors. (Tr. at 455-456, Paullus) This was no different than what she had been doing prior to December, 2009. (Tr. at 456, Paullus) The

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[14]. It was later estimated that eighty (80) hours of work was undertaken on this project, divided among WPAS, Ms. Paullus and Ms. Kihne. (R. 42; Tr. at 568, Auble)

[15]. Errors contained in the reports that were attributable to the Local 302 branch offices, and not the fault of Ms. Silva, were disregarded in this total. (Tr. at 593, Auble)

Decision finds that this "monitoring" of Ms. Silva's work with reports "three times a week" was a "preplanned scrutiny of Silva's work." (Dec. at p. 9, l. 4 – 15)[16]

To the contrary, the credible evidence was that, upon assumption of the role as immediate supervisor of the Local 8 staff, Ms. Early provided Ms. Silva three months to demonstrate improved performance. About this, Ms. Early testified (Tr. at 353):

> I felt that a three month period of time after return from a six month leave of absence was sufficient, if not more than sufficient time, for an employee who had been with Local 302 up to that point for five years to get back up to speed on their job duties.

Ms. Early described her "go forward" plan (Tr. at 353):

> Well as of that date, I was going to review her work performance with her and as of that date I had planned that to be the cut-off date of accumulating the information, so that I could prepare a report of her work performance and I had hoped to see improvement in her performance and I just didn't.

The product of this effort for the time period December 7, 2009 to March 5, 2010, as it pertained to Ms. Silva, was presented as raw data or "screen prints" by Ms. Paullus to Ms. Early. (Tr. at 457, Paullus) From this, Ms. Early prepared a "Summary of Errors made by Rebekah Silva since her return from LOA on 12/7/09." (R. 17; Tr. at 380-381, Early) While the summary provided a working tool, the screen prints and supporting documentation demonstrate the errors.[17]

Respondent attempted to demonstrate the nature of the errors committed, prove that these errors were not "self-caught" by Ms. Silva, and to demonstrate the import of

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[16]. These findings are the subject of Exceptions 23 and 24.

[17]. At the same time, Ms. Paullus provided Ms. Early with the raw data respecting errors committed by herself and Ms. Kihne for the same time period. (Tr. at 457-458, Paullus) Ms. Early prepared a Summary of Errors with respect to these reports as well. (R 14 and 15; Tr. at 372-374, Early) The ALJ's finding to the contrary is the subject of Exceptions 32 and 33.

these errors, but was disallowed by Judge Carson.[18] The issue of the source data for the "Summary of Errors" was first discussed during the testimony of Ms. Early (Tr. at p. 382, l. 14 – 18). In that colloquy, Judge Carson asked whether "this is the document that you folks are gonna get access to the underlying after we close," and when the answer was in the affirmative, he replied "Okay, that will be good." (Tr. at p. 383, l. 15 – 18) When the subject of the source data then arose during the testimony of the next witness, Ms. Paullus, Judge Carson allowed only a single example of an error and the import of that error from the source documents. (Tr. at p. 462, l. 9 – p. 463, l. 10)

The introduction of the source documentation for the errors Ms. Silva committed was discussed again at the close of the hearing. The instruction from Judge Carson was as follows (Tr. at 620 – 621):

> Okay. Counsel are hereby given until November the 12th, relative to their review of those documents to determine how, if at all, they want to handle it, by categorizing, arguing this, arguing that, whatever...Once you start looking at the raw data and determine what you think is the most suitable method for making whatever arguments you ultimately want to make relative to that, I am asking you confer and possibly stipulate, and if you are still at sea and we need to have a conference call, get in touch with my clerk....(Emphasis added)

A stipulation was not reached. When Respondent then attempted to comply by presentation of the source documentation with a cover Declaration as an addendum to the Post-Hearing Brief, the General Counsel filed a motion to strike. Rather than direct that the record be re-opened, the ALJ granted the motion to strike in the Decision. (Dec. p. 9, l. 48 – p. 10, l. 3)[19] Respondent was significantly prejudiced by being foreclosed from presenting the evidence of the underlying data.

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[18]. This is the subject of Exceptions 11, 12, 23, 24, 25, 26, 27, 28 and 29.

[19]. The grant of this Motion to Strike is the subject of Exception 29.

The Decision then finds, correctly, that "On March 9, Silva was called to a meeting by Early at which Union Representative Maloy was present." (Dec. at p. 9, l. 32 – 33) However, the Decision makes critical errors of fact finding about what transpired at that meeting, and as to the product of that meeting.

First, the Decision finds that at this meeting "Early stated that she considered Silva to have acted unprofessionally insofar as, at the arbitration of her grievances, she 'heard and watched my sarcastic tone when answering questions.'" (Dec. p. 10, l. 22 – 24) That finding is not supported by Silva's own testimony that she was the one who brought up the subject of professionalism. (Tr. at 156, l. 23)[20]

The Decision likewise ignores credible evidence concerning Ms. Early's approach to the meeting. At the meeting, the Summary of Errors was presented and discussed generally, as was Ms. Early's view that these one hundred and forty six (146) errors reflected "lack of attention to detail" and issues regarding "time management." (Tr. at 386, Early; R. 17) Ms. Early observed that at this meeting Ms. Silva response to this criticism was an unwillingness to take accountability for her errors and, instead, "she would try to deflect the blame onto somebody else." (Tr. at 387, Early)

The idea of Ms. Early "job shadowing" Ms. Silva was raised at the March 9 meeting. (Tr. at 393, Early) In the days that followed, Ms. Early job shadowed Ms. Paullus, Ms. Kihne and Ms. Silva. (Tr. at 393-396, Early; R. 20, 21, 22) The experience left Ms. Early convinced that Ms. Silva's work performance "was worse" than she had thought. (Tr. at 396, Early)

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[20]. This is the subject of Exception 31.

Following the March 9 meeting and her job shadowing of Ms. Silva, Ms. Paullus and Ms. Kihne, Ms. Early reported her findings to Mr. Auble and Business Manager Konopaski. (Tr. at 397, Early) Although no evidence was presented to the contrary, Judge Carson found he "[does] not credit Early's testimony that she made a report." (Dec. at p. 11, l. 1 – 2)[21]

The Decision correctly finds that Ms. Silva began an approved leave of absence on March 16, but states incorrectly that this leave was for "stress and anxiety."[22] The Decision improperly infers that this leave either did have, or should have had, an effect on how Respondent then proceeded with respect to Ms. Silva's employment given her recent and historic work performance. Dec. p. 11, l. 25 – 35)[23]

Based on input from Mr. Auble and Ms. Early, Business Manager Konopaski determined that given Ms. Silva's overall work performance, he could not allow her employment to continue. In his words he had been led "to the conclusion you simply do not care about doing your job correctly." (Tr. at 567, Auble; GC 25) The termination letter issued to Ms. Silva reflects the sum total of the reasons for this decision. (GC 25; Tr. at 567, Auble) [24] The accuracy of this letter was not challenged by the General Counsel who both introduced the letter and did not *subpoena* Business Manager Konopaski to confront him, as an adverse witness, about its veracity or accuracy.

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[21]. This is the subject of Exception 34.
[22]. This is the subject of Exception 49.
[23]. This is the subject of Exception 35.
[24]. The termination letter is dated March 29, 2010, and made her termination effective two weeks hence. This was done per language in Section 4.6 of the CBA which permits such notice in lieu of severance. (GC 25; GC 4 at 3)

ARGUMENT

I. THE ALJ COMMITTED AN ERROR OF LAW WHICH SHOULD NOT BE ADOPTED BY FAILING, UNDER *WRIGHT LINE,* TO REQUIRE OR TO FIND A CAUSAL NEXUS BETWEEN CIRCUMSTANTIAL EVIDENCE OF ANIMUS AND ADVERSE EMPLOYMENT ACTION.

A. The ALJ Improperly Excused The General Counsel From Proving A Causal Nexus Between Circumstantial Evidence Of Animus And Adverse Employment Action.

The ALJ is correct that a *Wright Line* analysis applies to the discipline of Kelly and Silva and to Silva's termination, but he failed to apply the modern version of that analysis.[25] Based on the application of *Wright Line* by the Federal Appellate Courts, the Board in Frye Electric, Inc., 352 NLRB 345, at 345, n. 2 (2008), adopted this articulation of the analysis (352 NLRB at 345, n. 2):

> [T]he Board and the circuit courts of appeal have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line,* sometimes adding as an independent fourth element, the necessity for there to be a causal nexus between the union animus and the adverse employment action. (Emphasis added)

Citing: American Gardens Management Co., 338 NLRB 644, 645 (2002). *See:* North Hills Office Services, Inc., 346 NLRB 1099 (2006). In the same passage in *Frye* quoted above, the Board noted that this formulation of the test has found favor. *Citing,* Shearer's Foods, 340 NLRB 1093, 1094, n. 4 (2003).

Subsequently, in Faurecia Exhaust Systems, Inc., 353 NLRB No. 34 at 2 (2008), the Board said of cases governed by *Wright Line* and its progeny:

> Cases analyzing adverse action under *Wright Line* are treated as presenting either a question of "dual motivation" or one of "pretext." In a dual motivation case, the "employer defends against a §8(a)(3) charge by arguing that, even if an invalid reason might have played some part in the employer's motivation, the

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[25]. Wright Line, 251 NLRB 1083 (1980), *enf.* 662 F.2d 899 (1st Cir. 1981), *cert. den.* 455 U.S. 989 (1982), and approved in NLRB v. Transportation Corp., 462 U.S. 393 (1983).

> employer would have taken the same action against the employee for a permissible reason...[A pretext case is one] in which the "reasons given for the employer's action are...either false or not in fact relied upon."

Citing: Palace Sports & Entertainment, Inc. v. NLRB, 411 F.3d 212, 223 (D.C. Cir. 2005); SFO Good-Nite Inn, LLC, 352 NLRB No. 43, slip op. at 2 (2008).[26]

The Decision finds that Silva would not have been terminated, and neither Silva nor Kelly would have been disciplined, "in the absence of...protected grievance filing activity." (Dec. at p. 15, l. 26 – 27; p. 16, l. 23 – 26; p. 18, l. 32 – 35) The ALJ does not articulate whether he is applying a "dual motivation" or "pretext" analysis. As Respondent did not admit any invalid purpose contributed to the any employment action taken, it is presumed that the ALJ applied a "pretext" model.

The predicate to finding a causal nexus between union animus and adverse employment action is, of course, evidence of union animus. The ALJ observes, correctly, that animus can be established circumstantially. (Dec. at p. 14, l. 20 – 21). The ALJ then finds, improperly, that "suspicious timing", "failure to conduct a meaningful investigation" and "failure to follow progressive discipline" is the circumstantial evidence of animus here.

Animus based on temporal relationship is generally reserved to cases where, for example, adverse employment action is taken between the filing of a representation petition and an election. *See: e.g.,* E.C. Waste, Inc., 359 F.3d 36, 43 (1st Cir. 2004). In that regard, the Board has found a delay of over two months from the union activity to

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[26]. *See also:* Windsor Convalescent Center of North Long Beach, 351 NLRB 975, 985, fn. 47 (2007)(Member Schaumber applying the "causal nexus" test in a *Wright Line* case involving refusal to hire); *Citing:* Planned Building Services, 347 NLRB 670, fn. 10 (2006). *And see:* Neptco, Inc., 346 NLRB 18, 19 (2005) Mere suspicion the employer harbored union animus is not enough).

the adverse employment action lends toward finding the conduct was too attenuated. Salisbury Hotel, 283 NLRB 685, 687 (1987).

"Temporal relationship" does not provide circumstantial evidence to any of the corrective action issued by Respondent here, most particularly the termination of Ms. Silva. The grievances with respect to the ten (10) day suspensions issued to Ms. Silva and Ms. Kelly—which the ALJ takes to be the seminal event in all that followed—were filed March 26, 2009. (GC 15, at p. 5)[27] The first act of discipline challenged in the Complaint issued over six (6) months later in October, 2009. (Dec. at p. 6, l. 19 – 20) Ms. Silva's discharge was not announced until March 29, 2010—over a year from the supposed triggering event. (Dec. at p. 11, l. 11 – 12) The discipline was far too attenuated from the filing of the discipline grievance to qualify as circumstantial evidence of animus, and the ALJ erred in finding otherwise.

The ALJ also found circumstantial evidence of animus in what he termed a failure to follow progressive discipline. The ALJ's errs in this regard on both the facts and the law. Whether Respondent followed its own process for administering discipline is a "due process" analysis common to a "just cause" determination under arbitration law. This requires a comparator to how other employees were treated in like circumstances.

The Board will not adopt an ALJ's recommendation based on a "8(a)(3) finding of Respondent's treatment of employees who were not similarly situated to [the Charging Party]." Engineered Comfort Systems, Inc., 346 NLRB No. 62, slip op. at 2 (2006); *See also:* Thorgren Tool & Molding, 312 NLRB 628, fn. 4 (1993)("An essential ingredient of

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[27]. The ALJ correctly found that Silva had expressed interest in becoming, and later became, Shop Steward of the Local 8 bargaining unit beginning nearly two (2) years prior. (Dec. p. 2, l. 48 – 50)

a disparate treatment finding is that other employees in similar circumstances were treated more leniently than the alleged discriminate was treated"). The record contains no evidence of disparate treatment.

The facts concerning Respondent's application of progressive discipline are set forth above and will not be repeated here. In summary: (1) the letter issued to Ms. Silva on January 25 was not disciplinary; (2) the disciplinary warnings issued to Ms. Kelly and Ms. Silva for attendance violations were pursuant to, and consistent with, a collectively bargained "no-fault" attendance policy; (3) the warnings issued to Ms. Kelly for insubordination and to Ms. Silva for inattention to her work were corrective in nature and appropriate to the violations committed; (4) Ms. Silva's termination followed substantial effort to correct her performance using counseling and prior corrective action.

According to the ALJ, circumstantial evidence was also found in failure to conduct a meaningful investigation. The evidence of such a failure must be substantial. *See: e.g.,* W.W. Grainger, Inc. v. NLRB, 582 F.2d 1118, 1121 (7th Cir. 1978). That failure is not found here. There is irony in the Decision on this point. On the one hand, the ALJ criticizes the scrutiny Respondent made of Ms. Silva's work. The ALJ then juxtaposes this with criticism that Respondent did not do enough by way of investigation. Worse, the ALJ disallowed detailed evidence of the nature of the investigation of Ms. Silva's work performance that was conducted by Ms. Paullus and Ms. Early. No evidence of animus, circumstantial or otherwise, can be drawn from the level of investigation Respondent conducted or was allowed to demonstrate.

B. Assuming *Arguendo* The Board Adopts The ALJ's Finding Of Union Animus By Circumstantial Evidence, The ALJ Misapplied The Law In Rejecting Respondent's Evidence Of Business Justification.

There is a distinction in Board law between "business justification" as an affirmative defense and "just cause" under a labor arbitration analysis. The issue in a Section 8(a)(3) case is not whether the Respondent's business decision satisfies "just cause." As the Court said in Healthcare Employees Union, Local 399 v. NLRB, 463 F.3d 909, 920 (9th Cir. 2006):

> Whether an employer's decision was ultimately good or bad, however, has no relevance in a Section 8(a)(3) case such as this, where the critical issue is the employer's motive. In determining whether an employment decision violated Section 8(a)(3), the "crucial factor is not whether the business reasons cited by the employer were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change." (Emphasis added)

Quoting: NLRB v. Savoy Laundry, 327 F.2d 370, 371 (2nd Cir. 1964); *See also:* Framan Mechanical, Inc., 343 NLRB 408, 418 (2004)(the Board does not substitute its business judgment for that of the employer).

The pivotal decision in this area is LSF Transport, 330 NLRB 1054, 1056 (2000). There, the Board articulated the Respondent's satisfaction of its affirmative defense as showing "by a preponderance of the credible evidence that the employee would have been discharged even in the absence of the union conduct." *Id.* at 1056; *See also:* Carpenter Technology Corp., 346 NLRB 766, 773 (2006)("The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of the union activities").

The law does not require the employer to show that it applied identical discipline to identical misconduct in a previous situation where there was no union activity.

International Baking Co. & Earthgrains, 348 NLRB 1133, 1138 (2006). "Manifold" work performance issues, including lack of reliability in attendance, and the need to review the employee's work product "almost daily" for errors, provides ample justification for termination despite Section 7 activities. W.E. Carlson, 346 NLRB No. 43, slip op at 4-5 (2006); *see also:* Southwire, 277 NLRB 377 (1985).

Whether Respondent had a legitimate business justification for the termination of Ms. Silva and the corrective action taken with respect to she and Ms. Kelly is properly analyzed independent of their union activities. As the Board has found, "the Act does not provide employees with immunity from otherwise legitimate employment decisions simply because of their status as union supporters." Framan Mechanical, Inc., 343 NLRB 408, 415 (2004).[28] This is true whether the employee is a militant union supporter, a shop steward, or the most casual of members. *See: e.g.,* Swift Textiles, Inc., 242 NLRB 691, 696 (1979)(with reference to a "militant union supporter").[29]

1. *The business justification for warning and terminating Ms. Silva for poor work performance.*

The evidence of the business justification for Ms. Silva's warning and termination is set forth above, and repeated here for emphasis. The need to take corrective action regarding Ms. Silva's work performance was substantial for an employee of relatively short tenure. Worse, her failures corroborated each other. Common to each was an inability, or unwillingness, to remain attentive to her job.

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[28]. *Citing:* Asarco, Inc. v. NLRB, 86 F.3d 1401, 1410 (5th Cir. 1996).

[29]. The Decision refers to the arbitration of the grievances filed by Ms. Silva and Ms. Kelly and a single instance of handbilling a Local 302 membership meeting as the sum of their union activities. Excpetion 2 is taken to the finding that the event of handbilling was a "protest" Ms. Silva "organized." Ms. Silva testified that all members of the Local 8 bargaining unit, including putative supervisor Paullus, participated in the referenced handbilling activity. (Tr. at 75)

Examples are found in the corrective action that was taken with regard to Ms. Silva prior to her 2009 leave of absence. On April 9, 2009, Ms. Silva was issued a verbal warning for "falling asleep at [her] desk" on that day and the day before. (GC 9)[30]

Shortly thereafter, Ms. Silva failed to place postage on a mass mailing concerning a contract ratification vote. Ms. Kihne, who came across the error, described the situation (Tr. at 504):

> I recall that it was a large mailing going out to an employer unit that was timely in nature, it had something to do with a contract that was being negotiated, an unfortunately the mailing was put out to be picked up by the postal service without postage on it.

Asked who was responsible for putting the mail out for delivery, Ms. Kihne responded: "The mail was being processed at the time by Rebekah." (Tr. at 504) For this error Ms. Silva received only a corrective warning although the error, in Mr. Auble's words, "could have been disastrous." (GC 38, Tr. at 550, 576, Auble)

Additional evidence of Ms. Silva's inattention to her duties was discovered when she took a personal leave of absence in 2009. After she left, Ms. Silva's duties were redistributed, including the processing of the "retiree report," which was assumed by Ms. Kihne. (Tr. at 506, Kihne) From this, Ms. Kihne gained knowledge of a "take back directed by the retiree report that was recorded inaccurately" and resulted in a delinquency in the account of a member "that should not have occurred." (Tr. at 507, Kihne) Ms. Silva committed the error. (*Id.*) Ms. Kihne described the impact (Tr. at 508):

> [T]he timing of this is about the time I was processing the retiree report and I was finding other errors on that report, so collectively it was concerning. If this were

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[30]. The Decision treats these two items of corrective discipline as background evidence of anti-union hostility on the part of Respondent. (Dec. at p. 5, l. 46 – 52) Respondent cites the same events as demonstrating an ongoing pattern of inattention to duty which buttress Respondent's justification for warning, and later terminating Silva.

> the only one, we're all human, we all make mistakes, but because there were multiple, it was concerning so I took it to my supervisor. (Emphasis added)

She then described Mr. Auble's directive (Tr. at 508-09):

> He suggested that I take a close look at the two months prior to that date we were discussing at the time. I'm not sure what the date was to be honest. So I reviewed the two months prior and found multiple errors on that, which I was able to do screen prints, take to Monique and Malcolm for review and based on that we determined further follow up was needed from there. (Emphasis added)

That follow-up included the participation of WPAS. (Tr. at 509, Kihne) Upon her return to work in December 2009, Ms. Silva was issued a written warning for the commission of thirty-nine (39) errors discovered in her absence. (GC 16)

The Decision finds that this written warning violated Section 8(a)(3) on the basis that it was motivated by retaliation, was "inconsistent with its progressive discipline policy", and would not "have been issued in the absence of Silva's protected grievance activity." (Dec. at p. 15, l. 43 – 46)

The finding that this written warning was inconsistent with progressive discipline is erroneous. Silva had been counseled many times about attention to detail, and that counseling is reflected in her performance evaluations. (R. 35) To find that Ms. Silva had not been counseled is to ignore these evaluations, or to find that her performance was not subject to correction because she participated in an arbitration; or both.

To make matters worse, the effort to correct Ms. Silva's performance by this warning letter didn't work. After receiving the written warning in December, Ms. Silva had access to the source material containing those errors, without interruption, for the next month and one half. (Tr. at 185 187, Silva)

But rather than focus on correcting her performance, within thirty (30) days of her return to work, Ms. Silva complained that she wasn't getting her work done, and Ms. Kihne and Ms. Paullus had to "catch her desk up." (Tr. at 448-49, Paullus) A month later, Ms. Kihne and Ms. Paullus had to catch her up again. (Tr. at 450, Paullus) Ms. Paullus testified sincerely that from the time Ms. Silva returned to work in December 2009, she and Ms. Kihne tried to help Ms. Silva get her job done and to perform better. (Tr. at 450, Paullus)[31]

Meanwhile, Ms. Silva levied complaints that her performance was being affected by such things as Ms. Paullus being out of the office for half the day. (Tr. at 358, Early)[32] Ms. Early conferred with Ms. Paullus about this, and determined it was not true. (Tr. at 358, Early) Ms. Silva also complained that she was being given an unreasonable amount of work. (Tr. at 364, Early) Ms. Early investigated, and determined that was not true either. (*Id.*)

Ms. Paullus found Ms. Silva's struggles perplexing. This was particularly true of what Ms. Silva claimed she did not understand when the error summary was presented to her at the March 9 meeting. The following colloquy occurred during Ms. Paullus' testimony (Tr. at 494-95): [33]

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[31]. Ms. Silva's testimony was exceedingly reckless with respect to her description of her job responsibilities. She claimed she was responsible for posting "easily over 15,000 transactions a week. Easily." (Tr. at 175, Silva) By Ms. Paullus' account, the number is more like 150. (Tr. at 440, Paullus) Coincidentally, asked how many pieces of mail she processed on average in a week. Ms. Silva responded "I would say at least, 15,000 pieces of mail." (Tr. at 172) Ms. Silva clearly engages in gross exaggeration, yet the ALJ credited her on all accounts anyway.

[32]. Ms. Silva repeated this claim in her testimony. (Tr. at 137, Silva) It still is not true.

[33]. The "credit process" Ms. Paullus referenced was the simple process by which a dues payment would be shown on matrix in the full amount owing, but the source would be derived from a combination of existing dues credit and current cash, check or charge payment. (Tr. at 495, Paullus)

Q: Do you remember a conversation at the March 9 meeting that had anything to do with the subject of credits?
A: Yes.
Q: What do you recall?
A: She admitted she did not understand the credit process.
Q: Okay. Did it surprise you that as of March 9, 2010, Ms. Silva did not understand the credit process?
A: Yes.
Q: Why?
A: It had been discussed, explained, walked through multiple times. Myself, I've witnessed others walk her through it and she'd always imply that "oh yeah, I get it" or "oh, I don't know what I was thinking" you know "I understand it" and we'd move forward. It wasn't until then that she admitted that she didn't understand the process. (Emphasis added)

The summary report and supporting screen prints Ms. Silva was confronted with at the March 9 meeting demonstrated that she had committed one hundred and forty six (146) errors in three (3) months. (R. 17, Tr. at 380, Early)

The ALJ not only infers but finds nefarious intent in Ms. Silva being denied access to the raw data. (Dec. at p. 16, l. 45 – 49) But Ms. Silva testified she *never* had access to the raw data during her employment. (Tr. at p. 36, l. 6 – 23) Given that, it was inappropriate for the ALJ to find that the denial of access was used to "set Ms. Silva up." There was an opportunity to present evidence on what difference, if any, access to raw data would have had on Ms. Silva's errors, but the ALJ foreclosed that evidence. Had it been allowed, the evidence would have shown, among other things, that only one (1) of the one-hundred forty six (146) errors committed by Ms. Silva was "self-caught" which flies in the face of the idea access to raw data would have solved the problem. (Dec. of Paullus and supporting docs.) Respondent had more than ample business justification for terminating Ms. Silva's employment, completely unrelated to her union activities and the ALJ erred in concluding otherwise.

2. *The business justification for corrective action respecting attendance, inattention to duty and insubordination.*

The ALJ proposes a finding that Sections 8(a)(1) and (3) were violated with respect to all corrective action taken against Ms. Silva during the 10(b) period. This includes discipline for attendance under a collectively bargained "no-fault" attendance policy. Starting on February 27, 2008, Ms. Silva was disciplined four (4) times for attendance. (GC 25; GC 6, 7, 8) Consistent with the "no-fault" policy, this discipline took the form of written warning or verbal warning reduced to writing. (Tr. at 545, Auble) Under that policy, discipline, and the level of discipline, is automatic once threshold levels of absence or tardiness are reached. (GC 18; Tr. at 545, Auble)[34]

Under *Wright Line,* to find a Section 8(a)(1) and (3) violation based upon application of a "no-fault" attendance policy would require finding disparate application of that policy in nexus to protected activity. *See: e.g.,* Thorngren Tool & Molding, Inc., 312 NLRB 628 at 628 and note 4 (1993)(an allegation of disparate application of discipline requires demonstration that "other employees in similar circumstances were treated more leniently"). The Decision points to no evidence of disparate application of the "no-fault" attendance policy.

The Decision also proposes that Section 8(a)(1) and (3) violations be found with respect to the corrective action taken with respect to Ms. Silva for her attempt to remove the "green binder." (Dec. at p. 15, l. 48 – p. 16 – l. 26) The letter issued to Ms. Silva on

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[34]. Ms. Kelly received written and verbal warnings for attendance on at least three occasions beginning in December, 2008. (GC 26, 28) The ALJ proposed a Section 8(a)(1) and (3) violation be found with respect to the October 4, 2009 corrective action taken with respect to Ms. Kelly's attendance as well. (Dec. p. 15, l. 26 – 30).

January 25 was not disciplinary in nature, and there was no evidence it was meant to be or received as such. (GC 11; R. 10; Tr. at 344, l. 23 – p. 346, l. 24)[35]

The ALJ found that the discipline issued to Ms. Kelly for insubordination was inconsistent with Business Manager Konopaski's "open door policy" and violated Sections 8(a)(1) and (3). (Dec. p. 6, l. 37 – 42; p. 15, l. 26 - 30)[36] But Ms. Kelly's conduct violated Respondent's policy regarding chain of command issued at a staff meeting on September 16, 2008 and Ms. Kelly was made aware of that policy. (GC 27; R. 37; Tr. at p. 546, l. 7 – p. 548, l. 13) Under the *Wright Line* analysis, there was ample business justification for the application of that policy in this instance.

II. THE ALJ'S PROPOSED ORDER SHOULD NOT BE ADOPTED WITH RESPECT TO THE ALLEGED ANTI-UNION STATEMENT BY MS. EARLY.

The ALJ found that "Early stated that she considered Silva to have acted unprofessionally insofar as, at the arbitration of her grievance, she 'heard and watched my sarcastic tone when answering questions.'" (Dec. at p. 10, l. 22 – 24)[37] The Decision proposes a Section 8(a)(1) violation be found with respect to this purported statement. (Dec. at p. 12, l. 7 – 19).

This proposed finding is a misapplication of the law to an incorrect finding of fact. As detailed above, even Ms. Silva testified the statement made was prompted by a comment of her own and made in the context of that comment. (Tr. at p. 156, l. 1 – 23) But even if the statement was made exactly as the ALJ found, it would not violate Section 8(a)(1).

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[35]. This finding is the subject of Exception 44.
[36]. These findings are the subject of Exceptions 14 and 42.
[37]. Exception 31 is taken to this finding.

The comment would only be unlawful if it was found to have been made as a statement or threat that future union activity would be futile. A threat or statement of futility must be clear and must be direct. *See: e.g.,* Twin County Trucking, Inc., 259 NLRB 576, 583 (1981)(management representative told employees that "unionization was useless" and the employer would "go to any lengths to stop them."); Smithfield Foods, 349 NLRB 1225, 1229 (2006)(statement during an organizing campaign that, with or without the union, the "plant will continue to get pay and benefits similar to other plants, not more, not less" was a statement of futility). Ms. Early's statement, even as the ALJ found it, was no such thing. It was criticism, but not anti-union.

III. BASED ON A MISCHARACTERIZATION OF THE FACTS, THE ALJ ERRONEOUSLY FINDS THAT RESPONDENT UNLAWFULLY IMPLEMENTED AND REFUSED TO BARGAIN ITS "COMPREHENSIVE POLICY STATEMENT."

The ALJ proposes a finding that Respondent violated Section 8(a)(1) and (5) of the Act by implementing amendments to existing personnel policies and "refusing to bargain with the Union regarding the effects of its changed policies relating to unit employees." (Dec. p. 13, l. 13 – 15 and l. 34 – 35)[38] The proposed finding is based on a mischaracterization of the facts and an error in reading the record.

The policies at issue were contained in a "Comprehensive Policy Statement" introduced in draft form at the January 21, 2010 staff meeting, and implemented on February 4, 2010. (GC 19, 20) Those policies are divisible as: (1) policies that were in place prior to January 21, 2010; (2) policies that were newly introduced in January, 2010; and (3) existing policies that were modified.

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[38]. This is the subject of Exception 39.

There was only one new policy. That policy concerns arrival and departure time as an amendment to the existing attendance policy. (GC 19, 20 at 4-5) This policy was adopted as a direct result of input issued by the Federal Department of Labor, during a 2009 wage and hour audit. (Tr. at 281, Colegrove) Respondent's Accountant, Beverly Colegrove, who was the DOL's point of contact on the investigation, described the issue raised by DOL (Tr. at 281-82):

> It became an issue because we had employees that, because of traffic or whatever reason, were showing up to work way earlier than their work shifts were to start and they would come in and sit at their desks, drink their coffee, put away their coat, whatever, but they were in the building, apparently beyond time to start for their working shift and it was the appearance, when we talked to the Department of Labor, that if somebody was at their desk before their scheduled working time, it could have the appearance that they were there to be on the job and working and so if they were asked a question, if we weren't paying them overtime during that time frame, we could be in violation of the Fair Labor Standards Act. (Emphasis added)

To address this, the DOL suggested a rule allowing admission to the work area "15 minutes before and have the lead time, 15 minutes after their work shift to depart the building." (Tr. at 283, Colegrove) Respondent adopted the DOL suggestion into the policy amendment. (GC 19, 20; Tr. at 283, Colegrove)

Respondent did not violate Section 8(a)(5) of the Act by declining to negotiate this change in policy. In that regard, Respondent's reaction was akin to that taken in Murphy Oil, 286 NLRB 1039, 1042 (1987)(ALJ found no 8(a)(5) obligation to bargain regarding policy implemented for OSHA compliance). *Cf.* Watsonville Newspapers, LLC, 327 NLRB 957, 958 (1999)(policy requiring sales employees to be "in the field" during certain portions of the work day--as a change from their schedule being self-directed--required bargaining under Section 8(a)(5)).

Because the adoption of this policy was in reaction to a recommendation from the Department of Labor, no Section 8(a)(1) violation can be found with respect to the adoption of this policy amendment either. Tecumsch Packing Solutions, Inc., 352 NLRB No. 87 (2008)(a rule prohibiting loitering "on company property" could be lawful if "tailored to legitimate employer concerns").

The rule was promulgated in response to advice from the DOL and Local 8 was so informed when the policy amendment was introduced. The documentary evidence in the record proves this. (R. 7, p. 5) Despite the ALJ's finding to the contrary, the reference of a connection between any policy amendments and "the arbitration" was not to this policy, but instead to the internet access policy. (Tr. at p. 336, l. 19 – p. 337, l. 21)

In that regard, the ALJ recommends a finding that Sections 8(a)(1) was violated by a comment attributed to counsel regarding clarification of the applicability of the internet access policy. (Dec. at p. 12, l. 1 – 2) This is the same error as discussed above. The only connection made between "the arbitration" and the internet policy was to clarify that policy *always had* applied only to the Local 8 staff with regard to the administration of the policy. (Tr. at p. 336, l. 19 – p. 337, l. 21) That point was made in the September 2009 arbitration with Ms. Maloy, Ms. Silva and Ms. Kelly present. (GC 15 at p. 37, p. 41). A clarification to the policy in view of the apparent confusion expressed by Local 8 at the September, 2009 arbitration was perfectly warranted.

The connection between the limitation on the application of the internet policy and the September 2009 arbitration did not violate Section 8(a)(1) as a matter of law. "An employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." Palms Hotel & Casino,

344 NLRB 1363, 1367 (2005), *citing,* Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004); Lafayette Park Hotel, 326 NLRB 824, 825 (1998). "In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." 326 NLRB at 825-827

"If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the new rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004).

A rule categorically denying employee access to employer computers for internet access does not "explicitly restrict activity protected by Section 7." Dealing specifically with employee use of employer e-mail systems for Section 7 purposes, the Board in Register-Guard, 351 NLRB No. 70 (2007) said:

> [W]e find no basis in this case to refrain from applying the settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications...as the [rule] on its face does not discriminate against Section 7 activity, we find that Respondent did not violate Section 8(a)(1) by maintaining the [rule]. (Emphasis added)

Citing: Fleming Co., 349 F.3d 968, 975 (7th Cir. 2003).

In Amcast Automotive of Indiana, Inc., 348 NLRB 836, 838 (2006), employee Rowe was discharged for violating company rules against misuse of company equipment and wasting time. Specifically, that he had used company computers for internet access to research a rumored acquisition of his employer by another company. About the legality of Rowe's *discharge*, the Board said (348 NLRB at 838):

> First, although Rowe's Internet activity may have been concerted, we disagree with the judge's finding that it was protected...The Board has recognized that, absent some 'direct impact' on employees' terms and conditions of employment, Section 7 typically does not extend to employees' activities regarding the ownership or control of an employer....Here we find insufficient evidence of a link between Rowe's internet activity and the employees' working conditions. (Emphasis added)

There was no evidence that Respondent's Internet Access rule interferes with the exercise of Section 7 rights nor could it reasonably been perceived as doing so.

IV. THE ALJ'S PROPOSED FINDING OF AN 8(a)(5) VIOLATION BY REFUSAL TO PROVIDE THE RESUME OF LUCY MIYAMOTO IS CONTRARY TO LAW.

The ALJ proposing a finding that Respondent's failure to provide Local 8 with the resume of Local 8 bargaining unit member Lucy Miyamoto violated Section 8(a)(5). (Dec. at p. 5, l. 8 – 10).[39] The ALJ then finds that the presentation of the Miyamoto resume at the hearing renders this a violation without a remedy. (Dec. at p. 19, l. 7 – 10) The refusal to provide Ms. Miyamoto's resume did not violate the Act.

A union's right to obtain information for purposes of contract administration is broad, but not boundless. In Detroit Edison Co. v. NLRB, 440 U.S. 301, 318 (1979), the Court bracketed its decision in NLRB v. Acme Industrial Co., 385 U.S. 432, 436 (1967). At 440 U.S. at 318:

> The union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested. The duty to provide information under §8(a)(5) turns upon 'the circumstances of the particular case'...and much the same may be said for the type of disclosure that will satisfy the duty. (Emphasis added)

More compelling for our purpose was the *Detroit Edison* Court's observation about requests involving personal information (440 U.S. at 317-319):

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[39]. This is the subject of Exception 6.

> The Board's position appears to rest on the proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate. But such an absolute rule has never been established, and we decline to adopt such a rule here...The sensitivity of any human being to disclose information that may be taken to bear on his or her basic competence is...well known... (Emphasis added)

Applying this standard, an information request will be viewed skeptically when it touches on employee privacy. Minnesota Mining & Mfg. Co., 261 NLRB 27, 30 (1982), *enfd. sub nom.* Oil Chemical & Atomic Workers Local 6418, 711 F.2d 348 (D.C. Cir. 1983).

The legitimacy of an employer's interest in protecting the confidential nature of "information that may be taken to bear on his or her basic competence," such as an employee's resume, is not arguable. The ALJ's proposed finding of a Section 8(a)(1) and (5) violation with respect to the Miyamoto resume should not be adopted.

CONCLUSION

For the foregoing reasons, Judge Carson's proposed finding and conclusions should be rejected to the extent they are contrary to the Exceptions taken by Respondent and otherwise adopted.

DATED this 19th day of February, 2011.

David A. Hannah
Law Office of David A. Hannah
12701 NE 9th Place, D311
Bellevue, Washington 98005
(425) 941-5997
davidahannah@comcast.net

Counsel for Respondent IUOE Local 302